The Law Society of Saskatchewan Library's online newsletter
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The Crown appealed the acquittal of the respondent on a charge of possession of methamphetamine for the purpose of trafficking, pursuant to s. 5(2) of the Controlled Drugs and Substances Act. There was a warrant (arrest warrant) for the respondent's arrest relating to charges of possession of stolen property and obstruction. The police obtained a general warrant (general warrant) authorizing them to remove any mobile device found on the respondent to examine it forensically. When police approached the respondent, she and her two male companions fled. She was caught, as was one of her companions, her brother. The officer believed that she was impaired by drugs. A black camera case with four baggies of methamphetamine, totalling 2.7 ounces, was found in the purse. Cst. D. indicated that he searched the purse for two reasons: to locate potential weapons that could harm him or anyone else and to locate the respondent's cellphone under the general warrant. In a voir dire, the trial judge found that the search of the pursue was unreasonable and contrary to s. 8 of the Charter. The purse was not with the respondent when police searched it, so there was no concern for officer or public safety. Also, it was unlikely that evidence relating to possession of stolen property and obstruction (the offences in the

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arrest warrant) would be located in the purse. The general warrant was found only to allow a search of the cellphone if it came into the authorities' lawful possession. The trial judge excluded the drug evidence. The Crown argued that the trial judge erred by: 1) finding the police did not have lawful authority to search the respondent's purse incident to her arrest; 2) concluding the general warrant did not authorize the police to search the purse for a cellphone; and 3) excluding the methamphetamine.
HELD: The appeal was dismissed. The grounds of appeal were determined as follows: 1) the trial judge did err by relying on the criteria for a safety search under MacDonald when delineating the scope of the safety objective of a search incident to arrest. The judge had held the police to a higher standard than was required under the applicable law. The appeal court found the question to be determined was whether the search of the purse was truly incident to arrest in that it was conducted for a valid law enforcement purpose related to the arrest. The search was not to obtain or preserve evidence relating to the reasons for the respondent's arrest. The appeal court concluded the jurisprudence did not support the proposition that the police may, for general safety reasons, always conduct an intrusive search for weapons incident to arrest. A search incident to arrest must be undertaken for a valid objective that is truly incidental to the arrest in question. There was no evidence that the police thought the respondent had a weapon in her purse. Further, she was already handcuffed and separated from her purse before it was searched, so it would have been impossible for her to use a weapon from it. The officer indicated that he also searched the purse to locate the respondent's cell phone pursuant to the general warrant. The common law power of search incident to arrest has not been expanded to allow a blanket search of the personal property of a detainee on the basis that a search must be conducted for inventory purposes. The appeal court found that the primary purpose of the search was to retrieve a cell phone, not safety concerns. The trial judge did not err; 2) the Crown argued that the general warrant authorized the police to covertly seek out and remove any mobile device the respondent may have had in her possession at the time of her arrest. The appeal court found that the wording of the general warrant supported the trial judge's interpretation of the limits of the authority conferred under the general warrant. The authority to search the respondent's person or her purse for a phone did not appear in the general warrant. Also, the search of a purse is not the type of search that falls under s. 487.01. The appeal court also held that s. 487.01(5.1) did not add anything to the Crown's argument; and 3) the appeal court found that the breach was not a minor, technical oversight in the course of an otherwise lawful search. Just because the searching officer was searching based on an honest mistaken belief did not mean the officer was acting in good faith. The trial judge did not err concerning the seriousness of the breach. The officer went through everything in the purse. The appeal court agreed with the trial judge that the respondent had a high expectation of privacy in her purse,

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and the impact of the breach was serious. The trial judge found that the seriousness of the breach, coupled with the impact of the breach, outweighed societal interests in having the case tried on its merits. There was no error made.

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Thieven v Thieven, 2019 SKCA 128

Richards Caldwell Tholl, November 26, 2019 (CA19127)

Family Law – Child Custody and Access – Appeal – Fresh Evidence
Family Law – Child Custody and Access – Interim – Mobility Application
Family Law – Child Custody and Access – Variation

The appellant appealed the interim decision allowing the respondent to move with the parties' three children from the Estevan Area to the Moosomin Area. The parties were married in 2002, they moved to Estevan in 2004 and continued to reside there at separation. The petition was filed in November 2016. In September 2017, the respondent was granted exclusive possession of the family home, and the children were ordered to reside with her primarily. In November 2017, the respondent was not successful in an interim application requesting permission to move with the three children. In June 2019, the respondent again applied for an interim order allowing her to relocate with the children. At that time, the family home was subject to an order nisi for judicial sale, and the respondent indicated that she would have to move out soon. She indicated that if she moved into low-income housing, the children would have to change schools. The respondent said that she had significant credit card debt and that she could not afford to fix her vehicle. She indicated her family in the Moosomin area were willing to provide her with free accommodation and the use of a vehicle. There was no evidence from the respondent's family. The respondent said that she would have better employment prospects in Moosomin than in Estevan due to the downturn in the oil industry. The chambers judge found that there was a material change in the circumstances because the respondent's financial situation had significantly deteriorated since November 2017. She found it was in the best interests of the children to continue to live with the respondent, and the only reasonable solution was to permit her to move with the children to address the dire financial situation. The disruption to the children's relationship with the petitioner was found to be minimal because he only saw them every second weekend. The appellant applied to adduce fresh evidence on the appeal. The evidence was regarding the immediacy of the sale of the family home, the availability of low-income housing in Estevan, and the proximity of low-income housing to the school for the two youngest children. The appellant argued that the chambers judge

erred by approaching the interim mobility application as though it were an application for a final order.
HELD: The appeal was allowed. The appellant failed to meet the service and filing requirements of Rule 59(2) of The Court of Appeal Rules, so he was not successful in his application to adduce fresh evidence. The respondent was awarded costs for the denial. The appeal court found that the respondent had failed to discharge the evidentiary and persuasive burdens on her concerning each step of the analysis: the material change and the best interests of the children. She had not met the threshold requirement of a material change. There was little evidence to support the chambers judge's conclusion that her financial situation constituted a change in the condition, means, needs and other circumstances of the children or a material change in the respondent's ability to meet their needs. The respondent had not updated her financial statement since November 2017, and at that time, she had no income except child and spousal support and child tax benefit. Further, the respondent was unemployed in 2017 and 2019, and the unskilled labour market in Estevan was as dismal in 2017 as it was in 2019. The 2017 fiat ordered that the family home be listed for sale so the respondent knew that she and the children would have to move. Further, there was no evidence that eviction was imminent in 2019. The respondent had also presented evidence in 2017 that she had incurred substantial debt, as she did in 2019. In 2017 the respondent did have a vehicle, but she did not in 2019. The children were, however, bussed to school, and they did not have any extracurricular activities. The chambers judge erred in finding a material change in the respondent's financial situation between November 2017 and July 2019. The matter was directed to proceed to pre-trial. No order was made as to costs.

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R v Harding, 2019 SKPC 63

Scott, October 28, 2019 (PC19060)

Criminal Law – Sentencing – Assault – Aggravated Assault
Criminal Law – Sentencing – Dangerous Offender – Reasonable Expectation of Eventual Control – Long Term Supervision Order
Criminal Law – Sentencing – Gladue Factors
Criminal Law – Sentencing – Long Term or Dangerous Offender

The offender was convicted of three Criminal Code offences following trial: aggravated assault contrary to s. 268(1); carrying a concealed weapon, a knife, contrary to s. 90; and breaching a recognizance contrary to s. 145(3). The Crown gave notice of its intention to apply for an order declaring the offender a dangerous offender. The offender was found to have stabbed the victim in the abdomen at a motel. The victim's blood was found on a knife that

the offender had tucked inside the waistband of the offender's shorts. The offender's recognizance at the time required that he keep the peace and be of good behaviour and that he not possess knives outside of his residence. The offender was 47 years old and identified as Métis. His father had alcohol issues and could be physically abusive. The offender had four daughters between the ages of six and 14, and he also had a 26-year-old son. The daughters all resided with the offender's sister. The offender had a problem with alcohol and drugs but indicated he had been sober for two years while on remand. He indicated his willingness to participate in treatment and programming in and out of custody. He did not have any family members that attended residential schools, nor did he ever reside on a reserve. The offender did attend cultural ceremonies and events while incarcerated. He indicated that he experienced racism throughout his life. The offender had 56 criminal convictions including numerous assaults (including assault with a weapon and assault causing bodily harm), numerous incidences of uttering threats, and attempted armed robbery. He had a history of non-compliance in the community. Dr. C, a forensic psychiatrist who assessed the offender, concluded that the offender had a severe substance abuse disorder and antisocial personality disorder. On clinical assessment, the offender was assessed at between moderate and high risk for violent recidivism. On the actuarial assessment he was in the high-risk category for committing a future hands-on violent offence. Dr. C. indicated that the offender did not need to do much to refrain from future offences, that he had accepted responsibility for his offending behaviour and had expressed remorse. Dr. C. indicated that aging lowers the risk for violent recidivism and that if the offender were released into the community in his late 40s, there was a reasonable possibility of eventually controlling the offender's risk in the community.
HELD: The court considered the criteria from Boutilier: a) whether the offender was convicted of a serious personal injury offence as described in s. 752(a): the offender conceded that aggravated assault met the criteria; b) whether the predicate offence formed part of a pattern of violence – the court found that a pattern of repetitive behaviour as well as a pattern of persistent aggressive behaviour had been established. The court did not conclude that the offender's aggressive behaviour showed a substantial degree of indifference with regard to the foreseeable consequences to others; c) was there a high likelihood of harmful recidivism? The Crown established a high likelihood; d) was the offender's violent conduct intractable? The court was not satisfied beyond a reasonable doubt that the offender was substantially or pathologically incapable of surmounting or overcoming his violent behaviour; and e) were the criteria for a dangerous offender designation established beyond a reasonable doubt? The court was not satisfied beyond a reasonable doubt of the likelihood of further threat or danger that the offender possessed to life, safety or physical well-being of other persons. The court considered whether to designate the offender a long-term offender. The court has to balance the factors to be considered, with

neither party having the burden of proof: a) was a sentence of more than two years appropriate for the predicate offence? The court found it was; b) was there a substantial risk that the offender would reoffend violently? The court found that there was a substantial risk without significant programming and supervision; c) was there a reasonable possibility of eventual control of the risk in the community? The court concluded that there was more than a mere hope that the offender's risk could be eventually managed in the community. The court was satisfied that there was a reasonable possibility of eventual control or management of the offender's risk in the community. On the whole of the evidence, the court was satisfied that with the proposed treatment plan and close supervision, the threat may be reduced to an acceptable level by designating the offender a long-term offender. There were a number of aggravating circumstances and some mitigating factors. A sentence of six years' imprisonment was found to be proportionate to the gravity of the offence of aggravated assault and the degree of the offender's responsibility. He was entitled to remand credit of 1.5 to 1, or 42 months. There were 30 months left to be served. Nine months concurrent time was imposed on the other two criminal offences since they arose out of the same set of circumstances as the aggravated assault. The court agreed with the offender's suggestion of a long-term supervision order (LTSO) of ten years. Ancillary orders were also made.

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R v Suchy, 2019 SKPC 64

Metivier, November 4, 2019 (PC19061)

Criminal Law – Assault – Sexual Assault
Criminal Law – Sexual Offences – Sexual Interference
Criminal Law – Defences – Charter of Rights, Section 10(b), Section 24

The accused was arrested for sexual interference and sexual assault. The accused argued that his s. 10(b) Charter rights had been breached, and a voir dire proceeded. Specifically, he argued that his rights were violated because: 1) the police interfered with his right to counsel of choice; and 2) he was not provided with a reasonable opportunity to contact counsel. The officer testified that he asked the accused which lawyer he would like to speak to and when the accused indicated that he did not know any lawyers, the officer reminded him that Legal Aid was available. The officer said that the accused indicated he wanted to speak to Legal Aid. The accused was placed in the telephone room and the officer dialed the phone to Legal Aid and left the room. The call lasted no more than two minutes, after which the accused was taken to the interview room. The accused said that the phone call lasted about 30 seconds and

that all the lawyer did was ask him for his birth date. He did acknowledge that he never told the officer that he did not actually speak to a lawyer. The officer again informed the accused about his s. 10(b) Charter rights prior to initiating the investigative interview. HELD: The officer fulfilled the informational duty when he read the accused his Charter rights from the standard issue card both at the time of his arrest and prior to the investigative interview. The accused confirmed he understood his rights on both occasions. The court was not persuaded that the accused was confused with what the officer told him, that he was pushed into contacting Legal Aid, that he did not know the difference between Legal Aid and another lawyer, or that he thought he could only talk to the same lawyer again. The accused said he did not exercise his right because he was scared and nervous, which the court indicated was not the same as not understanding. The implementation duty was triggered when the accused advised the officer that he would like to speak to a lawyer. The court found that the Crown established that the accused was provided with a reasonable opportunity to exercise his rights to counsel. The officer was found to have acted appropriately by reminding the accused that Legal Aid duty counsel was available. The court indicated that even if the officer had contacted Legal Aid on his own without the accused's requesting it, the accused was not deprived of his legal right to counsel of his choice because he never requested it. If the accused wanted to speak to a lawyer, he had a positive obligation to convey that to the officer. He also failed to act diligently in exercising his right by not saying anything to the Legal Aid lawyer while they were on the telephone, by not informing the officer he was not satisfied with his call, and/or requesting to call a lawyer when given a second opportunity. The court concluded that the accused's right to counsel was not breached.

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R v Lola, 2019 SKQB 63

Keene, March 5, 2019 (QB19310)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Constitutional Law – Charter of Rights, Section 8, Section 9

The accused was charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The defence challenged the validity of a warrant for a tracking device placed on the vehicle driven by the accused and brought a Charter application, alleging breaches of the accused's ss. 8 and 9 rights. A voir dire was held respecting the validity of the warrant and another respecting the Charter application. The Crown advised it would present its entire case during the latter voir dire

and defence counsel advised that it would not be calling any evidence at either of the voir dires nor the trial proper. It was agreed that admissible evidence from the voir dires could be applied to the trial proper. With respect to the challenge of the tracking warrant, the defence argued that it was facially invalid. The warrant stated that the informant had reasonable grounds to suspect the offence of trafficking had been or would be committed between January 2016 and December 2016. However, the justice issued a warrant that extended past December 2016, expiring on February 20, 2017, and thus, it could not lawfully operate beyond the stated dates upon which the informant believed the accused was trafficking cocaine. Regarding the allegation of a breach of the accused's s. 9 Charter rights, the defence submitted that there were inadequate grounds to stop and detain him. The RCMP officers, members of a drug investigation unit, testified that they had information from their sources and their counterparts in the Regina police drug unit that the accused was trafficking. They had surveilled him while he was in his vehicle and noted activity that was consistent with trafficking. The Regina unit advised them that the accused was going to Calgary to pick up more drugs, and the tracking device confirmed that the vehicle was in Calgary. The RCMP officer in charge of the investigation authorized officers waiting on the highway west of Regina to stop and arrest the accused for possession for the purpose of trafficking. The officers did so and had the vehicle towed to Moose Jaw, where they searched it. They found cocaine behind the console in the stereo area close to many air fresheners. Another RCMP officer testified as an expert, qualified to provide opinion evidence relating to cocaine trafficking. He stated that based upon his experience, the cocaine found was for the purpose of trafficking. Drug traffickers routinely use air fresheners to mask odours.
HELD: The court dismissed the challenge to the validity of the warrant and the Charter application. It found that the accused's ss. 8 and 9 Charter rights had not been breached, and if they had, the court would admit the evidence after conducting a Grant analysis. Based on the evidence, the accused was convicted of trafficking. Concerning the validity of the warrant, the court found there was nothing on the face of it that disclosed an error in timing. The language in 492.1(1) of the Criminal Code is prospective. What matters is whether the grounds to suspect that information would assist the investigation of an offence existed at the time the warrant issued and the face of the warrant disclosed that such grounds were present. Regarding the allegation of a breach of the accused's s. 9 Charter rights, the court found that as the police had proceeded directly to arrest the accused, it was unnecessary to review the law regarding detention. Because of the training and experience of the officers as well as their evidence regarding their ongoing investigation of the accused, the court held that the officers had reasonable grounds to arrest the accused without a warrant under s. 495 of the Code. The search of the vehicle was incidental to the arrest and, therefore, lawful, and no breach of s. 8 of the Charter occurred. After conducting the Grant analysis, the court decided

that admitting the evidence would not bring the administration of justice into disrepute. Under s. 4(3) of the Code, the circumstantial evidence supporting the conclusion that the accused was knowingly in possession of cocaine. Based on the evidence of the expert witness that the amount of cocaine was consistent with the purpose of trafficking, the accused was found guilty of the offence.

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Lehne v R, 2019 SKQB 314

Chow, December 5, 2019 (QB19290)

Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08 – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 8, Section 9

The appellant appealed his conviction for driving while his blood alcohol limit exceeded the legal limit contrary to s. 255(1) and s. 253(1)(b) of the Criminal Code. Among the grounds of appeal were whether the trial judge had erred: 1) in failing to find that the appellant's s. 8 and s. 9 Charter rights had been violated. The appellant argued that the officer did not have a reasonable suspicion that the appellant had alcohol in his body when he made an ASD demand. At trial and on appeal, the defence argued that since the officer testified that he had not smelled alcohol coming from the defendant's person or his vehicle, the officer did not have the requisite reasonable suspicion to make the ASD demand. The trial judge accepted the officer's testimony that the appellant had been speeding and hit the curb. His eyes were red and glassy, he slurred his speech, and his movements were slow and deliberate. The court found that the officer had the requisite reasonable suspicion and thus the s. 254(2) demand was lawful and that there had been no violation of the appellant's Charter rights; and 2) in finding the Crown's witness qualified to give expert evidence as to the appellant's blood alcohol content and by admitting her report as a full exhibit on the trial proper.
HELD: The appeal was dismissed. Concerning each issue, the court held that: 1) the trial judge had not erred. He correctly identified the applicable law, applied the facts as he found them and concluded that the officer possessed a reasonable suspicion. Therefore, there had been no Charter violations. The odour of alcohol or the admission of having consumed it is not a necessary precondition to the making of a valid ASD demand. The absence of such indicia does not necessarily vitiate the reasonableness of an officer's suspicion where other evidence affords an objective basis for it. 2) The trial judge had not erred in qualifying the witness as an expert. At the conclusion of the witness' testimony regarding her qualifications at the voir dire, the appellant's counsel explicitly advised the trial judge that he elected not to cross-examine the

witness on her qualifications. When it came time to make submissions on the issue, the appellant's counsel argued that the witness had not been proven impartial or independent, nor was she qualified to offer an expert opinion. The trial judge noted that there was no evidence that the witness would not provide an impartial opinion and correctly identified and applied the proper legal test. The evidence supported that his conclusion that the proposed witness possessed the necessary expertise and qualifications to provide the opinion expert opinion was both relevant and necessary.

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Carlson v Carlson Estate, 2019 SKQB 328

Robertson, December 20, 2019 (QB19302)

Power of Attorney – Accounting
Statutes – Interpretation – Power of Attorney Act, 2002, Section 18.1

The applicant sought an order for a final accounting from an attorney after the death of the grantor. The respondent attorney, the son of the grantor and brother of the applicant, was the sole beneficiary of the grantor's estate. The mother of the parties had made the will and the enduring power of attorney (POA) in 2011. After her death in 2017, the brothers disputed over the estate. Questions arose regarding the respondent's exercise of the POA. The applicant filed a caveat alleging that his mother was unduly influenced or not competent when she drafted her will. In 2018, a Queen's Bench judge issued a judgment in which he directed a pre-trial and trial on the issue of undue influence (see: 2018 SKQB 196). The applicant then filed this application and sought the assistance of the court to compel the respondent to carry out his statutory duty. HELD: The application was granted. The applicant was entitled to make the application under s. 18.1(1)(a)(ii) of The Power of Attorney Act, 2002. Although a POA is not required to provide a final accounting if the attorney is the sole beneficiary of the grantor's estate under s. 18.1(2)(a) of the Act, as in this case, the court had jurisdiction to order a final accounting when requested by an entitled person under s. 18.1(5) of the Act.

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Bridgewater Bank v Hautz, 2019 SKQB 331

Robertson, December 20, 2019 (QB19304)

Foreclosure – Farmland – Saskatchewan Farm Security Act
Foreclosure – Procedure

Statutes – Interpretation – Saskatchewan Farm Security Act

The defendants owned a quarter section of farmland (land). The defendant, D.H., purchased the land from his mother, the other defendant, when his father died in 2010. The plaintiff provided mortgage financing of $82,944 for the purchase of the land. The mother remained on the title as co-owner and co-mortgagor because D.H. did not qualify for mortgage financing on his own. D.H. made all payments required on the mortgage until it matured on November 1, 2017. The amount owing at that time was $77,248. The plaintiff demanded full payment of the outstanding balance. A notice of foreclosure was served on December 1, 2017. No payments had been made since the notice was issued. The plaintiff paid property taxes on the land of $7,944 in 2018. Mediation pursuant to The Saskatchewan Farm Security Act (Act) was unsuccessful. The plaintiff applied for an order that s. 11(1) and ss. 9(1)(d) and (f) of the Act did not apply to the mortgage. The issues were whether: 1) there was a reasonable possibility of the defendants meeting their obligations pursuant to the mortgage; 2) the defendants were making a sincere and reasonable effort to meet their obligations pursuant to the mortgage; and 3) an order pursuant to s. 11 of the Act was just and equitable in the circumstances.
HELD: The plaintiff had the onus of proving that either the defendants had no reasonable possibility of meeting their obligations under the mortgage or were not making a sincere and reasonable effort to do so. Even if one of the criteria is satisfied, the court can still dismiss the application "if it is satisfied that it is not just and equitable according to the spirit of the Act to make the order." The board made a nine-page decision, which attracted deference. The board concluded that D.H. had a reasonable possibility of meeting his obligations under the mortgage. The plaintiff challenged the conclusion because the board found that basic cash flow did not support D.H.'s ability to pay. The plaintiff pointed out that D.H. had an annual shortfall of more than $3,000 and that property taxes must be included in the ability to pay. The failure to make payments since 2017 was also suggested as evidence that DH could not meet his obligations. The court, however, found that the board's conclusion was supported by other reasons. A current inability to make full payments does not constitute no reasonable possibility to meet obligations under a mortgage. The board considered $15,000 of family income as available to pay debt and found that there was considerable equity in the land, which was valued at $317,500 compared to the $95,942.28 indebtedness. The board's finding on reasonable ability to meet the obligations under the mortgage was itself reasonable. The court concluded that the plaintiff did not satisfy it that the defendant did not have a reasonable possibility of meeting their obligations under the mortgage. The board also concluded that the defendants were making a sincere and reasonable effort. The basis for the decision was their history of making payments. The plaintiff pointed out that no payments had been made since the mortgage matured and that

D.H. failed to respond to any correspondence regarding refinancing with the plaintiff. The plaintiff satisfied its onus: the defendants were not making a sincere and reasonable effort to meet their obligations under the mortgage. The court found that the personal circumstances and hardships experienced by D.H. and his wife helped explain their current predicament and financial situation. That was a relevant consideration, as was the past history of making payments and their substantial equity. The court held that it was not just and equitable to grant the application at this time. The application was dismissed with the court's encouragement to D.H. to take meaningful steps to address the debt obligation. No order of costs was made.

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Murdoch v Trueman Estate, 2019 SKQB 332

Krogan, December 20, 2019 (QB19305)

Wills and Estates – Probate – Will
Wills and Estates – Wills – Testamentary Capacity – Suspicious Circumstances
Wills and Estates – Wills – Undue Influence

The respondent, daughter of the deceased, wished to have her mother's December 3, 2015 will (will) probated, whereas the applicants, the deceased son and other daughter, wanted the will declared invalid and effect given to a will executed on July 10, 2008. The deceased moved to Moose Jaw, where the respondent lived, just over a year before she passed away. She had previously lived in British Columbia (B.C.) for 90 years. Within days of arriving in Moose Jaw, the deceased executed the will, leaving her entire estate to the respondent and removing the applicants as beneficiaries. While she was living in B.C., the deceased lived close to and was cared for by the applicant daughter. The deceased became increasingly dependent on the applicant in her early 80s. The deceased moved into a nursing home in 2015. The applicant continued to assist the deceased and became a co-signatory on her bank account and investment accounts. The respondent's husband was in the military, so they were frequently living outside of Canada and did not see the deceased often. There was evidence that the deceased did not like the respondent's husband. The applicant son had lived in New Zealand for 31 years. He was working at minimum wage jobs and did not have any savings. The deceased had helped pay his costs to visit her in Canada. The deceased had a lawyer friend (friend) who had drafted wills for her and whom she consulted before any move she made. She advised the friend in 2013 that her memory was failing, so she wanted to move into an assisted living facility. He indicated that the deceased went along with what her daughters wanted because she was intimidated by them. The

respondent indicated that the deceased expressed unhappiness in her care home and wanted to move to Moose Jaw. Neither applicant was aware of any unhappiness or desire to move. The respondent came later that month to move the deceased to Moose Jaw. She told her sister she was there to visit. The respondent moved the deceased to Moose Jaw on November 23, 2015 and she met with a lawyer on November 27, 2015. The applicant daughter had not taken the deceased's money and the respondent acknowledged the same. The applicant daughter had noticed a gradual decline in the deceased's memory around 2005. In 2014, she fell and thereafter required morphine. According to the applicant daughter, the morphine further deteriorated the deceased's mental capacity. The applicants were not aware of the will executed in Moose Jaw. The will named the respondent as executor and sole beneficiary. If the respondent were to predecease the deceased, the respondent's husband would be the executor and sole beneficiary. The applicants were only to receive anything if the respondent and her husband predeceased the deceased. The value of the estate was $573,687.80. The lawyer who prepared the will had not done so on November 27, 2015, because he determined that the deceased was not competent to execute a will. She did not know the contents of her estate or the names of her grandchildren. The lawyer received confirmation from the respondent that the applicant daughter had overdrawn the deceased's bank accounts even though the respondent knew that not to be the case. Six days later, the deceased again attended on the lawyer. This time she advised him that she had $600,000 in mutual funds. The deceased learned of the value because the respondent had gone over her financial situation with her. The deceased also told the lawyer that her son was not interested in her and that the applicant daughter had dumped her. She said the applicant daughter was only interested in her estate as she had been in the case of an aunt. The lawyer found the deceased to be sharp on this day and the will was prepared and executed. The respondent indicated that she told the lawyer that she did not want to know about the contents of the will. The respondent said she learned of the will later and indicated that she hoped the deceased would change it somewhat. The issues were: 1) whether the deceased had testamentary capacity when she executed the will on December 3, 2015; and 2) whether undue influence was exerted upon the deceased such that it influenced the contents of the will.
HELD: The issues were determined as follows: 1) if the applicants were able to present evidence to rebut the presumption of capacity, the respondent would then have to prove testamentary capacity on a balance of probabilities. Where the respondent's evidence conflicted with the applicants', the court accepted the applicants'. The court was concerned with all of the respondent's evidence and indicated that it would be scrutinized carefully, whereas the same concern was not found with the applicants' evidence. There was a presumption that the deceased knew and approved of the contents of the will and had the necessary testamentary capacity upon proof that the will was duly executed with the requisite formalities. The

applicants' evidence, however, provided evidence of suspicious circumstances, such as: the physical and mental impairment of the deceased at the time of the preparation of the will; that the will was a significant change from the previous version; and that the will did not make testamentary sense. The deceased decided to exclude the applicant daughter due to the erroneous belief that she had dishonestly handled the deceased's finances. The deceased also believed, in error, that the applicant daughter abandoned her and that her son was financially stable and had no interest in her. The circumstances surrounding the execution of the will were suspicious. The deceased moved to Saskatchewan without two of her children or her friend knowing. Three days after her arrival in Moose Jaw, the deceased had a meeting with a lawyer she had never met. The court concluded that the respondent had some notion of the deceased's plan regarding her will before seeing a copy of it. When the will was executed a few days later, the deceased was sharp with names and the content of her estate, but unbeknownst to the lawyer, she had numerous incorrect notions. The respondent confirmed incorrect information for the lawyer that satisfied him with the deceased's competence. The court concluded that the persuasive force of the presumption was overcome. The respondent then had the burden to establish testamentary capacity on a balance of probabilities. The court concluded that the respondent did not discharge the burden of proving testamentary capacity. The will was void and could not be admitted into probate; and 2) the applicants had the legal and evidential burdens of proof regarding undue influence. The court could not conclude that the respondent's influence caused the deceased to have her will redrafted in the manner it was. The court found that the contents of the will resulted from the deceased's confusion and delusions, rather than as a result of fraud or coercion on the respondent's part. The applicants were given taxable costs.

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Kraus v S3 Manufacturing Inc., 2019 SKQB 336

Megaw, December 24, 2019 (QB19307)

Employment Law – Dismissal Without Cause – Damages

The plaintiff commenced an action to recover damages from the defendant for terminating his employment. He had been employed by the defendant from 2006 to September 2015 as a maintenance support worker, repairing plant equipment when it broke down. The defendant's business began to decline rapidly in 2015. It decided to apply to the federal government's WorkShare program to allow for the available work to be shared between the employees and the government, through employment insurance, who would then pay a portion of the employees' salaries. The defendant's CEO

held a meeting with the employees on August 24, 2016 to inform them of what was going on and the steps it was taking to deal with the business' difficulties. Matters continued to worsen so that on September 21, the plaintiff and the other employees were notified that they were laid off, but were advised that there would be a callback date on November 30 on the assumption that the WorkShare application would be approved. The letter stated that the defendant would prioritize work-share units based on the business needs, whether or not the application succeeded. The defendant learned that it was not successful in its application and then informed the employees by letter on November 4. The plaintiff testified that he did not look for work after the September layoff nor after the November letter, as he continued to assume that he would ultimately be called back to work. On January 28, 2016, he received a letter of termination with eight weeks' pay in lieu of notice. He commenced his search for employment and found a job in November 2016. The plaintiff argued that the appropriate notice period or pay in lieu of notice was 14 to 16 months. He was 57 years old at the time he lost his position, and it took a long time to find replacement employment. The defendant submitted that the appropriate period was five months, of which the plaintiff had received nine weeks' notice of payment. The plaintiff sought moral and punitive damages because the defendant had not been honest and failed to treat him with respect regarding his termination. HELD: The court found that the appropriate notice period, considering the plaintiff's age and length of employment, the nature of his position, and the depressed economic climate, was eight months. He was entitled to an additional amount of one month's pay in lieu of notice for the period from November to the actual termination. The plaintiff was not entitled to moral damages as there was no evidence that the defendant acted unfairly or in bad faith. Similarly, there was no basis on which to award him punitive damages.

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Balzer v Federated Co-operatives Ltd., 2019 SKQB 340

Popescul, December 31, 2019 (QB19316)

Civil Procedure – Queen's Bench Rules, Rule 4-26, Rule 4-31, Rule 11-1, Rule 18-1, Rule 18-2
Civil Procedure – Costs – Offer to Settle

The plaintiff sued the defendants for wrongful dismissal, defamation, the torts of deceit and breach of fiduciary duty, aggravated and punitive damages and unpaid overtime. He claimed damages in excess of $1,900,000. The trial judge dismissed the plaintiff's claim but awarded damages for unpaid overtime of $19,400 plus pre-judgment interest of $4,400 for a total of $23,800.

The court said that the parties could speak to costs (see: 2014 SKQB 32). The decision was appealed by both parties and each was dismissed (see: 2019 SKCA 93). The issue of costs remained outstanding. The defendants took the position that since they had served the plaintiff a formal offer to settle on March 28, 2011, before trial, wherein they offered to settle the action for $25,000 plus taxable costs, they were entitled to double costs from the time of service of the offer to settle in the amount of $210,842. They sought judgment in that amount, less the judgment in favour of the plaintiff of $23,800. The defendant had never formally revoked the offer. HELD: The defendants were entitled to double costs assessed under Column 2 of the Tariff of Costs for all steps taken in the proceedings since March 28, 2011. The plaintiff was entitled to costs assessed under Column 1 of the Tariff for all steps taken between the date of commencement of the claim and March 28, 2011. The court found that the defendants' offer to settle was valid, regardless of the 2013 changes to the rules. The offer was not accepted nor revoked and was more favourable than the judgment rendered. The formal offer to settle provisions in the former rules differed considerably from the present Queen's Bench Rules, but their purpose remains the same: a party who refuses a formal offer to settle runs the risk of increased costs. The court retains the discretion to decide that the formal offer to settle rules do not apply. There were no exceptional circumstances in this case that would justify the court refusing to enforce the costs consequences to the plaintiff's action of not accepting the defendants' genuine formal offer to settle.

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Saskatchewan v Racette, 2020 SKCA 2

Ottenbreit Schwann Tholl, January 3, 2020 (CA20002)

Civil Procedure – Appeal
Civil Procedure – Appeal – Lack of Objection at Trial
Civil Procedure – Evidence – Character Evidence – Admissibility
Civil Procedure – Evidence – Expert Evidence – Exceptions
Court – Judges – Duties – Closing Argument
Court – Judges – Duties – Jury Charge
Court – Judges – Duties – Questioning Witnesses

The respondent, Dr. J.R., had sued the appellants, the employer and Dr. S.L., for breach of contract and inducing breach of contract when he was not licenced as a forensic pathologist. After a jury trial, the respondents were both found liable and significant damages, including punitive damages, were awarded. The respondents appealed the liability findings and the quantum of damages. The respondent failed the necessary certification exams to be a forensic pathologist in Saskatchewan. The Saskatchewan College of Physicians and Surgeons determined that the respondent could

practice as a forensic pathologist with the employer if he obtained a special licence. To obtain the licence, Dr. J.R. had to undergo an assessment. The assessment would take approximately 3.5 months with Dr. S.L. as the lead assessor. The assessment started on May 14, 2012. In the fall, Dr. S.L. decided that the respondent did not meet the qualifications required to practice independently as a forensic pathologist, so did not give a positive assessment of Dr. J.R. Because of the final report of Dr. S.L., the respondent was not able to obtain a position as a forensic pathologist. A total of $5 million in damages was awarded following trial, including punitive damages of $1 million against Dr. S.L. and $500,000 against the employer. The issues on appeal were whether: 1) the trial judge erred by permitting the introduction of evidence of bad character, hearsay evidence, and other evidence that was irrelevant and prejudicial; 2) the trial judge erred by permitting the introduction of expert opinion evidence that was irrelevant, prejudicial, and outside of the areas in which the witnesses had been qualified to provide opinion evidence; 3) the trial judge impermissibly interjected himself into the questioning of the witnesses; 4) the respondent's closing address was impermissibly inflammatory; 5) the trial judge erred in his charge to and questions for the jury by treating Dr. S.L. as a party to the assessment agreement; 6) the trial judge erred in his charge to and questions for the jury regarding breach of contract, inducing breach of contract, bad faith and honest contractual performance; and 7) the trial judge erred in his charge to the jury regarding damages.
HELD: The appeals were allowed on both liability and quantum of damages, and the court ordered a new trial. The issues were analyzed as follows: 1) bad character evidence of Dr. S.L. was tendered. Character evidence is only admissible if it falls into one of the limited exceptions, or the probative value of the evidence outweighs its prejudicial effect. The failure to object at trial now caused difficulty for the appellants on appeal. The admission of the large volume of bad character evidence without any ruling on its admissibility was a factor in the appeal court's overall assessment of whether a miscarriage of justice had occurred. 2) The appellants did not object to any of the opinion evidence at trial and thus had a high hurdle on appeal. The appeal court found the "participant expert witness" exception was permissible in Saskatchewan to allow a witness to provide expert opinion evidence without being qualified as an expert. It allowed evidence of a witness's interactions with and observations of Dr. J.R. The error of allowing the opinion evidence without expert qualification or as falling under the exception was part of the totality of the circumstances in the matter, as was the appellants' lack of objection. The trial judge must ensure that an expert witness does not stray beyond the area in which they are qualified. Dr. S.L. was not successful in arguing that notice should have been provided by the respondent to confront Dr. S.L. with the transcript of his expert testimony from a criminal matter. The appeal court found that the lack of objection at trial barred the raising of the issue on appeal. 3) The appellants were mainly concerned with the trial judge's admonishment of Dr. S.L. in front of the jury. The

appeal court did not see any error in the interaction between the trial judge and Dr. S.L. 4) If a closing address goes beyond what is allowed, a trial judge has three options: caution the jury by giving a correcting instruction, strike the jury and conduct the trial alone, or declare a mistrial. If a trial judge fails to apply any of the remedies, a new trial may be required. The respondent's counsel inappropriately addressed the civil jury when he expressed his feelings on the case and also commented that he did not challenge any of them during jury selection. The respondent also significantly disparaged Dr. S.L.'s character by identifying largely extraneous matters. The closing address was found to represent an attempt to focus the jury on irrelevant considerations. The appeal court also found it inappropriate for the respondent's counsel to appeal to the jury's positions as members of the community and to invite them to consider the impact Dr. S.L.'s actions had on the community as a whole. The appellants' counsel did not object to any of the closing address. The trial judge only took a minor step to deal with the problems in the respondent's closing address. The appeal court concluded that a much stronger caution to the jury was required. The closing address was so problematic that there was considerable risk that a substantial wrong or miscarriage of justice had occurred. The improper closing argument weighed heavily in the appeal court's ultimate decision that a new trial was required. 5) and 6) There were two alleged causes of action: breach of contract and tort of inducing breach of contract. The breach of contract was alleged against the employer and the tort claim was alleged against Dr. S.L. The jury found that the employer and Dr. S.L. were liable for breach of contract. Dr. S.L. was not a party to the contract and the pleadings never claimed that he was. The jury should have been instructed that Dr. S.L. could not have breached the contract and could not be liable for breach of the contract. The trial judge erred. The appeal court found it likely that the jury was distracted from the real issue of whether a breach of contract actually occurred. Further, there was found to be a significant risk that the jury was diverted to a belief that it could substitute a finding of bad faith for a finding of breach of contract or improperly equated the two. The appeal court concluded that the jury did not make all the necessary findings in relation to the tort claim against Dr. S.L., because the instructions and question sheet did not ask it to do so. 7) Because a new trial was ordered, the appeal court did not address the appellants' arguments on the address to the jury regarding damages. A new trial was required due to the cumulative effect of the errors and shortcomings in the case.

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R v McNab, 2020 SKCA 4

Whitmore Leurer Tholl, January 7, 2020 (CA20004)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Sentencing - Curative Discharge

The Crown appealed the decision of a Queen's Bench judge sitting as a summary conviction appeal court to allow the respondent's appeal from the decision of a Provincial Court judge (see: 2018 SKQB 349). The respondent pled guilty to impaired driving contrary to s. 253(1)(a) of the Criminal Code and requested a curative discharge pursuant to s. 255(5) of the Code. The Provincial Court judge had concluded that she could not make that order on the facts. The respondent had driven in a stupor as a result of taking a prescription drug overdose in a failed attempt to commit suicide. The judge found that s. 255(5) did not provide a remedy for individuals with a mental illness as opposed to a drug or alcohol addiction and thus entered a conviction and imposed a fine on the respondent. The appeal judge allowed the appeal and ordered that the respondent's guilty plea be set aside and directed a new trial. In obiter, he stated that the scope of the court's jurisdiction under s. 255(5), in this case, allowed the judge to grant a curative discharge. The Crown requested leave to appeal the appeal judge's decision and for the court to reinstate the guilty plea and sentence imposed by the Provincial Court judge.
HELD: The Crown was granted leave to appeal. The court ordered that the respondent's guilty plea be reinstated and exercised its jurisdiction under s. 687(1) of the Code to order a curative discharge. It granted the discharge under s. 730 of the Code subject to conditions such as a one-year term of probation. It found that the appeal judge correctly interpreted the scope of the power given to the courts under s. 255(5) of the Code and, conversely, the Provincial Court judge erred in law by reading that provision too restrictively. When considering the purposes of sentencing set out in s. 718 of the Code, there was nothing in the evidence, in this case, to suggest that society would be better protected if the respondent received a penal sanction rather than treatment for mental illness. As well, the court found that the respondent's impaired driving arose from ingesting drugs in a failed suicide attempt were circumstances that fell within the meaning of s. 255(5) as a person who is "in need of curative treatment in relation to his consumption of alcohol or drugs".

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R v Probe, 2020 SKCA 5

Ottenbreit Caldwell Leurer, January 8, 2020 (CA20005)

Criminal Law – Corruption and Disobedience – Breach of Trust by Public Officer – Acquittal – Appeal

The Crown appealed the decision of Queen's Bench judge acquitting the respondent of breach of trust by a public officer as a councillor

and deputy reeve of the Rural Municipality of Sherwood Park (RM) contrary to s. 122 of the Criminal Code (see: 2018 SKQB 176). It did not appeal the acquittal of the respondent of the charge under s. 123(1)(c) of the Code. The trial judge found that the respondent had attempted to convince the Rural Municipality's reeve to lobby other members of council in connection with a motion that, if passed, would have asked the respondent to repay the RM $50,000 in legal fees paid on his behalf by the RM. The judge had also found that the respondent's willingness to compromise on another issue was contingent on the reeve's willingness to undertake this lobbying effort. Under s. 122 of the Code, the Crown was required to show that the respondent's actions were a "serious and marked departure" from the standard expected of him as a councillor. The judge concluded that the respondent's conduct had not fallen to or below this standard, and the Crown had not proven the actus reus. Concerning the mens rea of the offence, the judge found that the respondent's evidence raised a reasonable doubt as to whether he intended to use his office for corrupt or dishonest reasons and thus, the Crown had failed to prove that the respondent breached s. 122 of the Code. The issues were whether the trial judge erred in law: 1) by finding that the respondent did not commit the actus reus of the offence under s. 122 of the Code; and 2) by finding that the respondent did not have the necessary mens rea to commit an offence under s. 122 of the Code.
HELD: The appeal was allowed and a new trial was ordered. The court found with respect to each issue that the trial judge: 1) had erred in law by failing to identify the standards that governed the respondent’s conduct, and therefore had not properly assessed whether his conduct represented a serious and marked departure from what was expected from him as an officeholder. The judge failed to take into account, as required by Boulanger, that s. 144(2) of The Municipalities Act provides that no member of a municipal council shall attempt to influence the discussion or voting on any question, decision, recommendation or action to be taken involving a matter in which the member has a conflict of interest; and 2) erred in law by failing to consider the possibility that the respondent may have had other, additional, non-public good purposes in mind when he acted in the manner he did during his meeting with the reeve.

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Robertson v R, 2020 SKCA 8

Schwann Leurer Kalmakoff, January 17, 2020 (CA20008)

Criminal Law – Jury Trial – Instructions to Jury
Criminal Law – Defences – Self-Defence

The appellant was found guilty of manslaughter after a trial by jury. The Crown successfully applied to have him designated as a

dangerous offender and sentenced to an indeterminate period of detention. He appealed both his conviction and sentence. The appellant had been involved in a confrontation with a man who had pulled out a hypodermic needle. The appellant responded by pulling out the knife he was carrying. The other man claimed to have HIV, and the appellant stepped back from him, whereupon the man lunged toward him with the needle. The appellant testified at trial that he stuck his knife out instinctively, and the man was fatally stabbed. Because of this testimony, the trial judge instructed the jury to consider self-defence, and the jury asked for further directions during their deliberations. The jury found the appellant was not guilty of second-degree murder but guilty of manslaughter. The grounds of appeal were that the trial judge erred in: 1) his instructions to the jury relating to the "reasonableness" requirement in s. 34(1)(c) of the Criminal Code by either: a) failing to instruct the jury to consider only the amount of force used by the appellant and not the consequences of it, in determining whether his actions were unreasonable; or b) failing to provide a "Baxter instruction"; 2) by failing to instruct the jury that its consideration of the "nature and proportionality of the person's response" as set out in s. 34(2)(g) of the Code, must focus only on the amount of force used and may not take into account the relative size of the weapons wielded by the parties. At the hearing of the appeal, the court, in accordance with the Supreme Court's direction in R v Mian, invited counsel to provide further submissions on two additional questions: 3) whether the trial judge's instructions properly conveyed to the jury that, if the Crown failed to disprove self-defence, the appellant was entitled to an acquittal; and 4) if not, what was the appropriate remedy?
HELD: The appeal from conviction was allowed. The court set aside the verdict and ordered a new trial on a charge of manslaughter and did not, therefore, address the sentence appeal. It found concerning each ground that: 1) the trial judge had not erred in: a) his instruction to the jury on the "reasonableness" element in s. 34(1)(c) of the Code and had made specific reference to the factors listed in the language of s. 34(2). The appellant based his argument incorrectly on the former wording of the self-defence provisions set out in s. 34(1) of the Code that had been repealed and replaced by the current provisions on March 11, 2013; and b) not providing a Baxter instruction. It was not mandatory, and in any case, the trial judge's instructions on the "reasonableness" element were sufficient to meet the test; 2) the trial judge had not erred in his instructions to the jury on this point. The consideration of "nature and proportionality" in s. 34(2)(g) of the Code is to be read in the context of self-defence as against the nature of the threat that prompted the actions and not limited in the manner suggested by the appellant. 3) The trial judge had erred by repeatedly providing inconsistent and confusing instructions about the verdict that must flow from a finding that self-defence had not been disproved; and 4) the misdirection was on a question of law, which dictated that the appeal must be allowed. The error could not be cured by s. 686(1)(b)

(iii) of the Code because it was not trivial. The appellant was entitled to a new trial.

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Bouvier v Couillonneur, 2020 SKPC 4

Stang, January 16, 2020 (PC20003)

Statutes – Interpretation – Northern Municipalities Act, 2010, Section 112, Section 159, Section 159.1, Section 162, Section 166

The applicant, a voter in the northern village of Cole Bay and the acting clerk for the council of Cole Bay, brought an application pursuant to s. 166(2)(b)(ii) of The Northern Municipalities Act, 2010 for an order declaring the respondents, the mayor and two councillors, to be disqualified from the municipal council. Before this hearing, the respondents had already been disqualified by council. In June 2018, the mayor, one of the two other respondent councillors, the deputy mayor, another council member and the applicant attended a council meeting. The mayor and the respondent councilor were asked to leave the meeting because the council wanted to discuss a draft report recently provided by the provincial Ombudsman regarding alleged conflicts of interests. In the absence of the two respondents, the other councillors passed a resolution disqualifying them, believing that they had to act immediately on the report. In this application, the applicant alleged that the mayor was in a pecuniary conflict of interest. She said that the mayor was personally benefiting from her receipt of cheques from council for sums earmarked for a variety of authorized expenses incurred by Cole Bay. The mayor failed to account for funds by providing receipts and never returned any unspent funds. The applicant also alleged that all the respondents attended municipal council meetings from January 2017 to May 2018 at which they discussed and voted on numerous matters in which they had conflicts of interest. They failed to declare these conflicts and failed to take the other steps required of them pursuant to s. 162(1) of the Act. The respondents opposed the application and contested the validity of the purported resolution of council made in June 2018. They sought an order dismissing the application on the basis that the evidence presented at the hearing had not supported the alleged disqualifications, that they should be set aside pursuant to s. 167 of the Act and a declaration made that the offices were not vacated. Among the issues were: 1) whether the mayor had used funds from Cole Bay improperly; 2) whether the council's resolution in June 2018 confirming conflicts of interest by the respondents and declaring their offices to be vacant were a proper and valid resolution of council pursuant to s. 166(2)(a) of the Act; and 3) whether the applicant had proven on a balance of probabilities that the respondents contravened s. 162 of the Act.

HELD: The application was dismissed. The court declared that the mayor and one councillor's positions were confirmed. The other councillor's application was moot, as she had resigned before the application. It found that: 1) after reviewing the testimony and evidence of the applicant and the mayor, it preferred the evidence of the mayor. The receipts she produced corroborated her testimony regarding how she spent money for Cole Bay; 2) the resolution was invalid as the council was without a quorum as required by s. 112 of the Act. Regardless, a northern municipal council does not have the legal authority to remove councillors from their positions by way of a resolution. Only a judge of the Queen's Bench or Provincial Court can remove a councillor when s. 162 of the Act is engaged; and 3) the applicant had failed to present sufficient evidence to show that the respondents were in a conflict of interest as defined by s. 159.1(1) and (2) of the Act. None of the matters dealt with by the council pertained to individuals, albeit relatives of the respondents, who fell within the definition of "family" or "closely connected person" under s. 159 of the Act. Nor had the evidence established how the alleged conflict of interest would have furthered the respondents' personal interests.

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Rosetown (Town) v Bridge Road Construction Ltd., 2020 SKQB 3

Hildebrandt, January 7, 2020 (QB20003)

Civil Procedure – Settlement Agreement – Multiple Defendants – Pierringer Agreement

The plaintiff, the Town of Rosetown, sought an order: (i) implementing a Pierringer agreement between it and the defendants, Bridge Road Construction and Bridge Road Developments (collectively Bridge Road); (ii) dismissing the cross-claim filed by the defendants, Samson Design and Samson Engineering; (iii) barring future claims against Bridge Road, (iv) granting leave for amended pleadings; (v) providing directions for the questioning of the proper officer of Bridge Road by counsel for Samson, and (vi) providing directions regarding disclosure to the trial judge of the amount paid by Bridge Road pursuant to the agreement. The plaintiff had commenced an action against Bridge Road, alleging deficient design and construction of a personal care facility in Rosetown. It later amended it to include Samson. Samson advanced a cross-claim against Bridge Road. The issues were: 1) whether court approval of the agreement was required; 2) if so, should the court approve the agreement; and 3) whether the court should approve the terms of the draft order?
HELD: The plaintiff was granted the order approving the agreement. The court found respecting each issue that: 1) it is a

requirement in Saskatchewan that the court approve Pierringer agreements; 2) the terms of the agreement would be approved. The terms included the discontinuance of claims against Bridge Road and its undertaking not to pursue Samson "for an amount greater that would be the case if Bridge Road remained defendants" and dismissal of Samson's cross-claim against Bridge Road; and 3) it would approve the draft order to implement the agreement.

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R v Gamble, 2020 SKQB 16

Danyliuk, January 22, 2020 (QB20015)

Criminal Law – Sentencing – Aboriginal Offender
Criminal Law – Assault – Aggravated Assault – Sentencing

The accused was convicted of aggravated assault contrary to s. 286(1) of the Criminal Code and unlawful confinement contrary to s. 279(2) of the Code. Acting as a member of the Indian Posse and ringleader of a group who intended to punish a member of another gang, the accused took the victim to a house where he was held, beaten and tortured. The accused heated knives, branded the victim with the gang initials and cut off one of his fingers. It was only because the victim escaped that the torture stopped. The Crown's position was that a global sentence of nine years less remand time should be imposed. The defence argued for a four and one-half year sentence less enhanced remand time. Before this sentencing hearing occurred, the defence applied unsuccessfully for an order for the preparation of a state-funded Gladue Report (see: 2010 SKQB 237). The sentencing hearing then proceeded in reliance upon the contents of several Pre-Sentence Reports (PSRs). The accused was of Aboriginal descent and 34 years old at the time of the offences. He had not known his father, his mother abandoned him when he was seven, and his stepfather raised him. Because of his stepfather's addiction issues, the accused was taken into care and placed in several foster homes. He had witnessed and suffered physical abuse. At some point, he began using drugs and alcohol and became a gang member. He had finished grade 11 but had not been employed during adulthood. His youth and adult criminal records were lengthy, and his offences had become more serious and more violent over time. The PSR indicated that his risk to reoffend was at the 100th percentile. The accused's expressions of remorse were inconsistent, but he had shown some evidence of it during his time in remand and some indication that he would try to leave his gang. HELD: The court sentenced the accused to seven and one-half years on the assault charge and seven and one-half years concurrent for unlawful confinement. He was given credit for time on remand at the rate of 1.5 that reduced his sentence to approximately 4.8 years. The factors that the court considered mitigating were that he

seemed to be taking responsibility for his actions and that he had had a difficult childhood. The latter was addressed under the Gladue factors. It noted that the onus was on the accused to provide information regarding his background. He had refused to provide detailed information or contact data for collateral witnesses for the PSRs that had made assessing his background, specifically his Gladue factors, more difficult. The information that he did provide was inconsistent and unreliable. However, the court concluded that, to some degree, those factors mitigated the accused's moral blameworthiness. The aggravating factors were numerous and included the accused's criminal record, pattern of violent crimes and history of disobedience of court orders. The accused's gang affiliation, his role as ringleader in the offences and the inordinate amount of violence he used against the victim were aggravating factors as well.

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Consumers' Co-operative Refineries Ltd. v Unifor Canada, Local 594, 2020 SKQB 17

Keene, January 22, 2020 (QB20016)

Civil Procedure – Contempt

The Regina facilities of the applicant, Consumers' Co-operative Refineries, were being picketed by members of the respondent, Unifor Canada Local 594, in a manner to which the applicant objected. It alleged that the picketers were obstructing access to and exit from their facilities and that the picketers were going beyond conveying information and soliciting support. It had first brought an injunction application in December 2019. The court granted an interim injunction on December 17 but, at the request of the respondents, agreed to adjourn the application until December 23 because the respondents had not received sufficient notice. However, the judge did grant an interim injunction to commence on December 18. At the December 23 hearing, the judge granted an injunction on much the same terms. The terms of the interim order included that picketers could communicate information to those wishing to receive it for a maximum of five minutes. The order restrained them from impeding, obstructing or interfering with ingress or egress except to convey information. In this application, the applicant brought a civil contempt complaint submitting that the respondents had breached the interim order and sought a finding of the same and imposition of a fine and solicitor-client costs. In support of its complaint, the applicant filed affidavits deposed by numerous management-level employees, in which they described various incidents that occurred to them personally between December 18 and 22 involving the respondent's members engaging in actions against them that prevented them from entering the

applicant's facilities. The respondent did not contradict these affidavits, and it submitted two affidavits from members who had no direct evidence as to the events in question.
HELD: The respondent was found in civil contempt of the order. Pursuant to Queen's Bench rule 11-27, it ordered the respondent to pay a fine of $100,000 to the court. The court found that the interim order was clear and unequivocal, and the respondent had notice of it. Based on the evidence from the affiants and video recordings, the court was satisfied that the applicant had proven beyond a reasonable doubt that the respondent intentionally disobeyed the order on numerous occasions by obstructing ingress to and egress from the facilities. This was not a case in which it would be appropriate to award solicitor-client costs, but the applicant would receive costs from the respondent under Column 3 to reflect the relative complexity and importance of the application.

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